

reasons the petitioning party believes there is noncompliance. The petition also must include the date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition.

(b) *Original jurisdiction.* Any party seeking enforcement of a final Board decision or order issued under its original jurisdiction or enforcement of the terms of settlement agreement entered into the record for the purpose of enforcement in an order or decision issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance.

(c) *Petition by an employee other than a party.* (1) Under 5 U.S.C. 1204(e)(2)(B), any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board for enforcement. Except for a petition filed under paragraph (c)(2) or (c)(3) of this section, the Board will entertain a petition for enforcement from an aggrieved employee who is not a party only if the employee seeks and is granted party status as a permissive intervenor under §1201.34(c) of this part. The employee must file a motion to intervene at the time of filing the petition for enforcement. The petition for enforcement must describe specifically why the petitioner believes there is noncompliance and in what way the petitioner is aggrieved by the noncompliance. The motion to intervene will be considered in accordance with §1201.34(c) of this part.

(2) Under §1201.33(c) of this part, a nonparty witness who has obtained an order from a judge that his or her employing agency provide the witness with official time may petition the Board for enforcement of the order.

(3) Under §1201.37(e) of this part, a nonparty witness who has obtained an

order requiring the payment of witness fees and travel costs may petition the Board for enforcement of the order.

(4) Under §1201.55(d) of this part, a nonparty witness or other individual who has obtained a protective order from a judge during the course of a Board proceeding for protection from harassment may petition the Board for enforcement of the order.

(5) A petition for enforcement under paragraph (c)(1), (c)(2), (c)(3) or (c)(4) of this section must be filed promptly with the regional or field office that issued the order or, if the order was issued by the Board, with the Clerk of the Board. The petitioner must serve a copy of the petition on each party or the party's representative. If the petition is filed under paragraph (c)(1) of this section, the motion to intervene must be filed and served with the petition.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 65235, Dec. 19, 1994; 62 FR 48935, Sept. 18, 1997; 73 FR 6834, Feb. 6, 2008; 77 FR 62371, Oct. 12, 2012]

§ 1201.183 Procedures for processing petitions for enforcement.

(a) *Initial Processing.* (1) When a party has filed a petition for enforcement of a final decision, the alleged noncomplying party must file one of the following within 15 days of the date of service of the petition:

(i) Evidence of compliance, including a narrative explanation of the calculation of back pay and other benefits, and supporting documents;

(ii) Evidence as described in paragraph (a)(1)(i) of this section of the compliance actions that the party has completed, and a statement of the actions that are in process and the actions that remain to be taken, along with a reasonable schedule for full compliance; or

(iii) A statement showing good cause for the failure to comply completely with the decision of the Board.

The party that filed the petition may respond to that submission within 10 days after the date of service of the submission. The parties must serve copies of their pleadings on each other as required under §1201.26(b)(2) of this part.

(2) If the agency is the alleged non-complying party, it shall submit the name, title, grade, and address of the agency official charged with complying with the Board's order, and inform such official in writing of the potential sanction for noncompliance as set forth in 5 U.S.C. 1204(a)(2) and (e)(2)(A), even if the agency asserts it has fully complied. The agency must advise the Board of any change to the identity or location of this official during the pendency of any compliance proceeding. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President by and with the consent of the Senate is charged with compliance.

(3) The judge may convene a hearing if one is necessary to resolve matters at issue.

(4) If the judge finds that there has been compliance or a good faith effort to take all actions required to be in compliance with the final decision, he or she will state those findings in a decision. That decision will be subject to the procedures for petitions for review by the Board under subpart C of this part, and subject to judicial review under § 1201.120 of this part.

(5) If the judge finds that the alleged noncomplying party has not taken all actions required to be in full compliance with the final decision, the judge will issue an initial decision resolving all issues raised in the petition for enforcement and identifying the specific actions the noncomplying party must take to be in compliance with the Board's final decision. A copy of the initial decision will be served on the responsible agency official.

(6) If an initial decision described under paragraph (a)(5) of this section is issued, the party found to be in non-compliance must do the following:

(i) To the extent that the party decides to take the actions required by the initial decision, the party must submit to the Clerk of the Board, within the time limit for filing a petition for review under § 1201.114(e) of this part, a statement that the party has taken the actions identified in the initial decision, along with evidence establishing that the party has taken those actions. The narrative statement

must explain in detail why the evidence of compliance satisfies the requirements set forth in the initial decision.

(ii) To the extent that the party decides not to take all of the actions required by the initial decision, the party must file a petition for review under the provisions of §§ 1201.114 and 1201.115 of this part.

(iii) The responses required by the preceding two paragraphs may be filed separately or as a single pleading.

(7) If the agency is the party found to be in noncompliance, it must advise the Board, as part of any submission under this paragraph, of any change in the identity or location of the official responsible for compliance previously provided pursuant to paragraph (a)(2) of this section.

(8) The complying party may file evidence and argument in response to any submission described in paragraph (a)(6) of this section by filing opposing evidence and argument with the Clerk of the Board within 20 days of the date such submission is filed.

(b) *Final Decision of noncompliance.* If a party found to be in noncompliance under paragraph (a)(5) of this section does not file a timely pleading with the Clerk of the Board as required by paragraph (a)(6) of this section, the findings of noncompliance become final and the case will be processed under the enforcement provisions of paragraph (c)(1) of this section.

(c) *Consideration by the Board.* (1) Following review of the initial decision and the written submissions of the parties, the Board will render a final decision on the issues of compliance. Upon finding that the agency is in non-compliance, the Board may, when appropriate, require the agency and the responsible agency official to appear before the Board to show why sanctions should not be imposed under 5 U.S.C. 1204(a)(2) and 1204(e)(2)(A). The Board also may require the agency and the responsible agency official to make this showing in writing, or to make it both personally and in writing. The responsible agency official has the right to respond in writing or to appear at any argument concerning the withholding of that official's pay.

(2) The Board's final decision on the issues of compliance is subject to judicial review under 1201.120 of this part.

(3) The Board's final decision on the issues of compliance is subject to judicial review under § 1201.120 of this part.

(d) *Burdens of proof.* If an appellant files a petition for enforcement seeking compliance with a Board order, the agency generally has the burden to prove its compliance with the Board order by a preponderance of the evidence. However, if any party files a petition for enforcement seeking compliance with the terms of a settlement agreement, that party has the burden of proving the other party's breach of the settlement agreement by a preponderance of the evidence.

(e) *Certification to the Comptroller General.* When appropriate, the Board may certify to the Comptroller General of the United States, under 5 U.S.C. 1204(e)(2)(A), that no payment is to be made to a certain Federal employee. This order may apply to any Federal employee, other than a Presidential appointee subject to confirmation by the Senate, who is found to be in non-compliance with the Board's order.

(f) *Effect of Special Counsel's action or failure to act.* Failure by the Special Counsel to file a complaint under 5 U.S.C. 1215(a)(1)(C) and subpart D of this part will not preclude the Board from taking action under this subpart.

[54 FR 53504, Dec. 29, 1989, as amended at 63 FR 41179, Aug. 3, 1998; 77 FR 62372, Oct. 12, 2012]

Subpart G—Savings Provisions

§ 1201.191 Savings provisions.

(a) *Civil Service Reform Act of 1978 (Pub.L. 95–454)—(1) Scope.* All executive orders, rules and regulations relating to the Federal service that were in effect prior to the effective date of the Civil Service Reform Act shall continue in effect and be applied by the Board in its adjudications until modified, terminated, superseded, or repealed by the President, Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, as appropriate.

(2) *Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

(3) *Explanation.* Mr. X was advised of agency's intention to remove him for abandonment of position, effective December 29, 1978. Twenty days later Mr. X appealed the agency action to the Merit Systems Protection Board. The Merit Systems Protection Board docketed Mr. X's appeal as an "old system case," i.e., one to which the savings clause applied. The appropriate regional office processed the case, applying the substantive laws, rules and regulations in existence prior to the enactment of the Act. The decision, dated February 28, 1979, informed Mr. X that he is entitled to judicial review if he files a timely notice of appeal in the appropriate United States district court or the United States Court of Claims under the statute of limitations applicable when the adverse action was taken.

(b) *Whistleblower Protection Act of 1989 (Pub. L. 101–12)—(1) Scope.* All orders, rules, and regulations issued by the Board and the Special Counsel before the effective date of the Whistleblower Protection Act of 1989 shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed by the Board or the Special Counsel, as appropriate.

(2) *Administrative proceedings and appeals therefrom.* No provision of the Whistleblower Protection Act of 1989 shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, including personnel actions that were proposed, threatened,